

that the claim on which the defender pleads compensation being illiquid cannot be set off against the pursuer's admitted claim; therefore repel the defences, and decern against the defender in terms of the conclusions of the summons; find the pursuer entitled to expenses both in the Sheriff Court and this Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Pursuer—W. A. Orr Paterson.
Agents—J. & A. Peddie, W.S.

Counsel for the Defender—Mackintosh. Agents
—Gifford & Simpson, W.S.

M., Clerk.

Saturday, November 21.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

MARY LAW v. ADAM HUMPHREY.

Bill—Onerosity.

A party granted to the mother of his housekeeper, who was illegitimate, a bill for a sum of money due to the latter as wages, in fulfilment of a promise made to her on her death-bed. His executor resisted payment on the ground of (1) facility of the grantor, and fraud; (2) no consideration by the holder of the bill. He failed to prove the former, and held that the latter was not a good defence.

The pursuer in this case brought an action in the Sheriff-court against the defender to recover from him, as executor of the late David Humphrey, payment of a bill for £50, granted by the latter to her, in consideration, as was alleged, of the services of her illegitimate daughter, deceased, who had acted for some years as his housekeeper. The pursuer did not aver that she herself gave any consideration for the bill, which was a regular and valid document.

The defender pleaded *inter alia*—“(1) No value having been given by the pursuer for the bill libelled on, or for any part of the sum specified in it, she, as drawer and holder, is not entitled to recover payment thereof from the defender. (2) The deceased David Humphrey having been under no obligation to grant said bill, and his signature having been unduly impetrated from him to it while it was in an imperfect condition, by misrepresentations as to his liability, and under improper pretences, at a time when he was of weak and facile intellect, the pursuer is further debarred from insisting in the conclusions of the present action.”

The Sheriff-Substitute (COMRIE THOMSON) pronounced the following interlocutor:—

“*Aberdeen, 15th May 1874.*—Having resumed consideration of the cause, Find it proved that the deceased Mary M'Donald, an illegitimate daughter of the pursuer, was for several years in the service of the late David Humphrey. That the defender is David Humphrey's executor-dative; that at the time of Mary M'Donald's death David Humphrey was due to her a considerable sum of arrears of wages; that on her death-bed she requested Humphrey to pay what was due to her to her mother, the pursuer; that David Humphrey undertook to do so; that after her death Humphrey

granted to the pursuer the bill now sued for; that he did so in implement of his foresaid undertaking: Finds, in point of law, that the defence of ‘no value’ is unfounded: Finds that the defender has failed to prove that the deceased David Humphrey was facile, or that the bill in question was fraudulently impetrated from him: Therefore repels the defences: Decerns against the defender in terms of the conclusions of the summons: Finds the pursuer entitled to expenses of process, allows an account to be given in, and when lodged remits the same to the Auditor of Court to tax and report.

“*Note.*—It was maintained by the defender that his author, the deceased David Humphrey, was at the time the bill libelled was signed by him of weak and facile intellect, and that he would not have signed it had he known what he was about. The Sheriff-Substitute is of opinion that that defence has entirely broken down. The witnesses called to support it, and who knew the deceased intimately, concur in representing him as a strange sort of person, but they are equally unanimous in saying that he was obstinate and not easily led. The schoolmaster, who knew him well for fifteen years, depones as follows:—‘He was not of weak or facile intellect, nor by any means easily imposed upon. He transacted business like other men. I don't think he would have signed a bill unless he had been due the money.’

“The genuineness of the bill, and the fact that it was truly the expression of the grantor's mind, being thus established, the only other question falling to be disposed of is the defence of non-onerosity. It is true that no value was given to the acceptor of the bill by the drawer. That is to say, no services were rendered by the pursuer to the defender's author. But admittedly the pursuer's daughter was entitled to the sum in the bill, and on death-bed she desired Humphrey to pay that sum to her mother, the pursuer. He promised to do so. That promise could not be enforced in a Court of law, because the pursuer was not the representative of her deceased daughter, who was illegitimate, and died intestate. But Humphrey chose of his own free will to convert what was an imperfect obligation, binding upon him morally but not legally, into a perfect obligation, and this he did by granting the bill now in question. It seems to the Sheriff-Substitute that there is here a sufficient answer to the plea of want of consideration. It has been held that value is established, although the bill was granted in implement merely of an obligation in honour, or of a debt barred by prescription, or of a natural duty, such as providing more liberally than the law requires for a wife or a child. (See Chief-Justice Mansfield's observations in *Gibbs v. Merrill*, 3 Taunt 307, and also the opinion of the Judges in *Seton v. Seton*, 2 Brown, Ch. Cas., 616).

“The present case seems to fall under the same category.

“The remaining defences may be disposed of in a sentence. The body of the bill was not filled up until after the acceptor's death, but his signature was on the stamp, and he was liable for whatever the stamp would carry. Besides, the sum was expressed in figures, though not in words, on the face of the bill when the deceased signed it.”

The defender appealed to the Sheriff, who pronounced the following interlocutor:—

“*Edinburgh, 19th June 1874.*—The Sheriff having considered the reclaiming petition for the de-

fender against the interlocutor of 15th May last, with the record, proof, and whole process, in respect the defender has failed to prove that the bill in question was granted without consideration, dismisses the appeal, affirms the interlocutor appealed against, and decerns."

The defender appealed.

At advising—

LORD PRESIDENT—The Sheriff and Sheriff-Substitute are both right, but I do not agree with their grounds of judgment. According to our law want of onerosity is not always a good defence. Suppose there had been none here, and David Humphrey had simply given the bill to the pursuer, her claim to it would have been just as good. The Sheriff-Substitute was wrong in allowing the pursuer a proof. She wanted none. She was entitled to recover; and the same error runs through the whole of his interlocutor, namely, that she had to prove that she gave consideration for the bill. That is not the law of Scotland, and his reference to English cases shows how he was wrong. The law of England is quite different, and it is on this that the Sheriff-Substitute founds his judgment. Even if the defender had proved what he alleges it would have been of no use to him. Though I do not agree in the grounds of the Sheriffs' judgment, I do in the result at which they have arrived. As regards the question of expenses, when an executor conducts a litigation reasonably, he ought not to be made liable if he fails, but here I think the defences are most unreasonable, the allegations as to fraud and facility being such as the defender must have known to be untrue.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively 15th May 1874, and 29th June 1874: Find that the deceased David Humphrey, of whom the defender (appellant) is executor-dative, accepted the bill sued on for £50, drawn on him by the pursuer (respondent): Find that it is not alleged that the said bill was ever retired by the said David Humphrey, or the said sum of £50 paid by him: Find that the defender has failed to prove that the said bill was obtained from the said deceased by fraud or misrepresentation or undue influence; therefore repel the defences, and decern against the defender in terms of the conclusions of the summons; Find the defender liable personally in expenses to the pursuer, both in the Inferior Court and this Court, reserving to him his relief against the free executry estate, if any: Allow accounts of these expenses to be given in, and remit the same, when lodged, to the Auditor to tax, and report."

Counsel for the Pursuer—Lorimer. Agent—John Auld, W.S.

Counsel for the Defender—Mair. Agent—Wm. Officer, S.S.C.

Saturday, November 21.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

JAMES CRUICKSHANK v. JOHN PARK AND OTHERS.

Multiplepounding—Double Distress.

The outgoing tenant of a farm assigned the crop on the ground to the incoming tenant at a certain rate to be paid to the landlord, who, after deducting his rent, was to hand over the balance to the outgoing tenant. A creditor of the latter arrested the money in the hands of the incoming tenant. *Held* that there was double distress, and that the landlord was entitled to raise a multiplepounding.

John Park, the incoming tenant, and Mr and Mrs Watson, outgoing tenants, of the farm of Tillykeira, Lonmay, entered into the following agreement:—"It is agreed that the incoming tenant shall duly harvest the growing grain crop of 1873, now in the ground, and that the quantity of the same shall be estimated by proving from the stock, by men mutually chosen, who will have power to allow the incoming tenant a sufficient remuneration for harvesting, to be deducted from the price: It is further agreed that the incoming tenant pay over the price of the said crop to the proprietor, Mr Milne of Craigellie, or his factor, say 15s. per quarter to account at Martinmas 1873, and the rest when the flars are struck; the said proprietor or his factor being bound to pay over the same to the outgoing tenants above-named, after deducting the rent due for crop 1873." The sum payable was £140, and this was arrested in the hands of Park, the nominal raiser. Mr Milne, the landlord of the farm, and real raiser, raised an action of multiplepounding, which was defended by the arrester Cruickshank, on the ground that there was no double distress. The Sheriff-Substitute sustained this plea, and, on appeal, the Sheriff pronounced the following interlocutor:—

"*Edinburgh, 2d July 1874.*—The Sheriff having considered the Reclaiming Petition for the real raiser in support of his appeal against the interlocutor of 8th May last, with the answers thereto, record, and whole process, dismisses the appeal; affirms the interlocutor appealed against, and decerns, but varies the finding as to expenses as follows,—Finds no expenses due to or by the arrester Cruickshank, but finds the other claimants entitled to expenses from the real raiser, of which allows an account to be given in, and remits the same, when lodged, to the auditor for taxation.

"*Note.*—The Sheriff regrets to be obliged to throw out this action on a technical ground, but it is impossible to arrest the objection stated to the competency of the process by the claimants A

B Watson and Mrs Watson. In 1873 these persons were leaving the farm of Tillykeira. The crop on the lands was their property, and by agreement, dated 5th August 1873, they assigned it over to Park, the incoming tenant, on condition that he should pay the value thereof to the proprietor, Mr Milne, or his factor, who again was taken bound to pay over the same to the granters of the deed, after deducting the rent due for crop 1873. Mr Park thus held the crop as trustee for the landlord, and the subsequent arrestment used in his hands by Cruickshank, as a creditor of the